

Arizona Department of
Economic Security



Appeals Board

Appeals Board No. T-1002368-001-B

In the Matter of:

XXXXXXXXXXXXXXXXXXXX
X/X XXXXXXX X. XXXXX, XXX
XXXX X. XXX XX., XXX. X
XXXXXXXXXX, XX XXXXX

ESA- TAX UNIT
ROBERT DUNN III,
ASSISTANT ATTORNEY GENERAL,
1275 W. WASHINGTON ST. CFP/CLA
PHOENIX, AZ 85007-2926

Employer

Department

DECISION
AFFIRMED

THE **EMPLOYER**, through counsel, petitions for a hearing from the Reconsidered Determination issued October 27, 2005, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued December 10, 2001, which held that the Employer is liable for Arizona Unemployment Insurance Taxes on the basis of gross payroll of at least \$1,500 in a calendar quarter, beginning October 1, 2000, and that services performed by individuals as **nurses**, constitute employment, and remuneration paid to those individuals constitutes wages.

The petition for hearing has been timely filed. The Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

At the direction of the Appeals Board, a hearing was held on September 14, 2006, in Phoenix, Arizona, before William E. Good, an Administrative Law Judge, for the purpose of considering the following issues, of which all parties were properly noticed:

1. Whether the employing unit is liable for Arizona Unemployment insurance taxes beginning October 1, 2000, under A.R.S. § 23-613.

2. Whether services performed by individuals as **nurses** constitute employment as defined in A.R.S. § 23-615, and are not exempt or excluded from coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617.
3. Whether remuneration paid to individuals for such services constitutes wages as defined in A.R.S. § 23-622, which must be reported and on which State taxes for unemployment insurance are required to be paid.

The following persons were present at the hearing and gave sworn testimony:

XXXX XXXX	Employer witness
XXX XXXXX	Employer counsel
XXX XXXXXXXX	Employer witness
ROBERT J. DUNN	Department counsel
XXXXXX XXXXXX	Department witness
XXXX XXXXXXXX	Department witness

At the hearing, and by subsequent agreement of the parties, Board Exhibits No. 1 through 31 were admitted into the record as evidence.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer, X XXXX XXXXXXXXXXXXX, provides the services of various types of Health Care Workers (nurses) to client health care facilities, the nurses are required to be licensed according to their specialty. The Employer has approximately XX such workers on its availability list at any time (Tr. pp. 23, 27, 56, 72; Bd. Exhs. 20, 21).
2. The clients inform the Employer of the client's needs for nursing services, and the Employer calls nurses to check their availability. Nurses sent to a facility use the Employer's time sheets to record their time at the client, and fax the sheets to the Employer each Monday. The Employer pays the nurse an hourly wage ranging from \$XX to \$XX per hour, each subsequent Friday. Nurses are forbidden from working overtime hours for a client, unless the Employer, not the client, has given permission (Tr. pp. 23, 31-33, 61; Bd. Exhs. 20, 21, 23).
3. The Employer insists that nurses enter into independent contractor agreements with the Employer (Tr. pp. 28, 29; Bd. Exh. 20).

4. With some exceptions, where the client objects to the Employer's form of agreement, the Employer and the clients enter into an agreement with clients, using the Employer's form (Tr. pp. 31, 71; Bd. Exh. 21).
5. The Employer provides no training for the nurses, and nurses are not required to attend meetings or file reports with Employer. The clients may require reports from the nurses (Tr. pp. 33, 75).
6. If a nurse, who had agreed to a specific assignment, could not report for that assignment, the nurse was required to report that problem to the Employer at least two hours before the start of the assignment. The Employer would attempt to obtain a substitute for the client. Nurses are not able to use substitutes at their own discretion (Tr. pp. 34, 35, 36, 62, 74; Bd. Exhs. 20, 23).
7. The Employer did not tell nurses how to perform services for the client, or in what sequence, but left that factor to each client. The Employer requires nurses to wear medically specific uniforms at each client, and specifies "white closed toe shoes" and that "No dangling earrings or sharp edged finger rings may be worn", and that "fingernails should be short with natural nail coloring. Hair should be worn back away from your face." Nurses are required to wear a badge with the Employer's name and telephone number (Tr. pp. 34, 37, 38, 48-50, 57, 58; Bd. Exh. 23).
8. The Employer does not prevent nurses for working for other employers or facilities. If a client hires a nurse who was on assignment from the Employer, the client must pay a recruitment fee of \$X,XXX to the Employer, if the client has not given certain notice and engaged that nurse's services from the Employer, for a minimum number of hours (Bd. Exh. 21).
9. The business that obtained the Employer's list of clients and nurses in XXX XXXX (XXXX), treats the nurses as employees (Tr. pp. 50, 51, 94-97, 100, 101). According to the Department records, several nurses who have performed services for the Employer have also performed services for other medically related facilities that were not clients of the Employer, and for temporary help firms that furnish their employees to medical facilities. These services were performed as employees and the workers received base period wages used for determining eligibility for the receipt of unemployment insurance benefits (Bd. Exhs. 25-29).

10. Neither the Employer nor the nurse furnishes tools to be used at the client. Any tools or equipment needed by the nurse are furnished by the client (Tr. p. 64).
11. Clients require the Employer to provide liability insurance, and the clients require the Employer to indemnify it against any claims made because of a nurse's negligence and to indemnify the client against any claim made by a nurse for "wages or benefits" (Bd. Exh. 21).
12. The Employer requires liability insurance from the nurses, but does not enforce this requirement (Bd. Exh. 20).
13. The Employer has the right to terminate the agreement and the nurse's services for cause without prior written notice (Bd. Exh. 20).
14. The Employer has a gross payroll of at least \$1,500 in a calendar quarter (Bd. Exhs. 2-5).

The Employer contends that it has no employees and that nurses, whose employment is in dispute in this case, are independent contractors and not employees.

Arizona Revised Statutes § 23-615 defines "employment:"

"Employment" means any service of whatever nature performed by an employee for the person employing him,

Arizona Revised Statutes § 23-613.01(A) provides:

Employee; definition; exempt employment

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristics of an independent profession, trade, skill or occupation.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.
4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit ". . . . solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

- a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
- b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e)

requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The nurse is not permitted to have assistants perform duties for the nurse or to substitute for the nurse at the client.

This factor is indicative of **an employer/employee relationship.**

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

Although the Employer does not control the method of performing the services, the Employer requires the nurse to wear the Employer's badge and to comply with an apparel and personal appearance code. The Employer has the right to control the performance of services by the nurse but defers that right to the client

This factor is indicative of **an employer/employee relationship.**

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions.

The Employer does not require regular or written reports, but has the right do so.

This factor is indicative of **an employer/employee relationship.**

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

The Employer does not have any facility at which the work could be performed. The nurse does not decide where the work is to be performed.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

The nurse is not able to hire a substitute, but must tell the Employer if the nurse is not able to keep an assignment.

This factor is indicative of **an employer/employee relationship.**

f. Establishment of Work Sequence

If a person must perform services in the order set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routine and schedules of the employing unit.

While the Employer is not able to set the sequence of work, because it is at the client's facility, the Employer has the right to set the sequence which it has deferred to the client as a practical matter. Much of the sequence of work is controlled by recognized standards of medical practice.

This factor is indicative of **an employer/employee relationship.**

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

The Employer has the right to terminate the agreement and the nurse's services for cause without prior written notice.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is the right of an independent worker.

The nurses have the discretion of accepting or rejecting an assignment. However, once the assignment is accepted, the nurse must adhere to the hours, rather than complete the work on the nurse's own schedule.

This factor is indicative of **an employer/employee relationship.**

i. Training

Training of an individual by an experienced employee working with him, or by required attendance at meetings, is indicative of control because it reflects that the Employer wants the service performed in a particular manner.

The Employer offers no training and requires no meetings. The nurse has already been trained and must still follow any training instituted by the client.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, it indicates control over the amount of time the worker spends working, and impliedly restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The nurse is free to accept other work so long as the schedule is followed.

This factor is indicative of **an employer/employee relationship.**

k. Tools and Materials

If an employing unit provides the tools, materials and wherewithal for the worker to do the job, it indicates control over the worker. Conversely, if the worker provides the means to do the job, a lack of control is indicated.

Neither the Employer nor the nurse provides any tools. Any tools or equipment need is provided by the client.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

i. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated

when the worker is paid on a job basis and has to take care of all incidental expenses.

The nurse is not entitled to expense reimbursement and has no expense connected with performing the services for the employer (Bd. Exh. 20).

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E) are equally appropriate for consideration in determining the relationship of the parties.

1. Availability to the Public

Generally, an independent contractor makes his services available to the general public, while an employee does not.

The nurse performs services for other employers while not performing services for the Employer. The nurse does not offer services to other facilities, other than as an employee.

This factor is indicative of **an employer/employee relationship.**

2. Compensation

Payment on a job basis is customary where the worker is independent, whereas an employee is usually paid by the hour, week or month.

The nurse is paid on an hourly basis and the Employer does not permit the nurse to work overtime for the client without specific permission. Where overtime is the subject of permission or not, the arrangement is for one of employment, where the Employer is interested in the costs of employment, not just the end result.

This factor is indicative of **an employer/employee relationship.**

3. Realization of Profit or Loss

An employee is generally not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with the work being performed. The success or failure of his endeavors depends in large degree upon the relationship of income to expenditures.

Here, the nurse has no way of realizing a profit or suffering a loss, based on costs or efficiency. The only way to absorb fixed costs is to work more hours for the Employer.

This factor is indicative of **an employer/employee relationship.**

4. Obligation

An employee usually has the right to end the relationship with an Employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

Here, there is no provision holding the nurse liable for ending the arrangement or negligence in performing the services for the client.

This factor is indicative of **an employer/employee relationship.**

5. Significant Investment.

A significant investment in equipment and facilities would indicate an independent status of the individual making the investment. The furnishing of all necessary equipment and facilities by the employing unit would indicate the existence of an employee relationship.

The nurse has no significant investment in providing the services for the client. While some providers having an independent status have no significant investment, there is a significant investment in facilities by the client. The nurse merely uses the facility.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

6. Simultaneous Contracts

An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.

The Employer has not established that any nurse worked for other companies in the capacity of an independent contractor. There is no evidence that any nurse advertised such services as an independent contractor.

This factor is indicative of **an employer/employee relationship.**

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered.

One such factor in this case is that the type of business engaged in by the Employer, is either a referral business where a registry enables nurses to find temporary employment by a client who pays the nurse, or a temporary help firm, that assumes the status of employer so the client may engage a nurse and dispense with their services at will.

This factor is indicative of **an employer/employee relationship.**

Another factor exists when a client hires a nurse who was on assignment from the Employer. If that happens, the client must pay a recruitment fee of \$X,XXX to the Employer if the client has not given certain notice and engaged that nurse's services from the Employer in a minimum number of hours. It is an employment situation where an employee is subject to restrictions on whether to continue working for an employer rather than performing services for another user. The restriction imposed on the client is also a restriction on the nurse.

This factor is indicative of **an employer/employee relationship.**

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when it stated:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where it stated:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation... (emphasis added).

There are no factors that tend to support the Employer's contention of independent contractor relationship.

The factors that tend to support an employer/employee relationship include:

Authority over Individual's Assistants, Compliance with Instructions, Oral or Written Reports, Personal Performance, Establishment of Work Sequence, Set Hours of Work, Amount of Time, Availability to the Public, Compensation on job basis, Realization of Profit or Loss, Obligation, Simultaneous Contracts.

The factors that not applicable in this case are:

Place of Work, Training, Tools and Materials, Expense Reimbursement, Significant Investment, Right to Discharge.

We have thoroughly examined the facts present in this case, including the factors that have the practical effect of preventing a nurse, assigned to a client by the Employer, from becoming employed by a client. We have considered the relevant law and administrative rules as they are applicable to those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Section R6-3-1723(D) and (E), and conclude that the services performed by individuals as nurses constitute employment.

We also find that, based on the quarterly wages of those we find as employees, the Employer is liable for Arizona Unemployment insurance taxes.

Arizona Revised Statutes § 23-622(A) defines "wages" as:

"Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. ...

Arizona Administrative Code, Section R6-3-1705(B) provides in pertinent part:

The name by which the remuneration for employment, or potential employment as provided in ... [A.A.C. R6-3-1705(G)], is designated or the basis on which the remuneration is paid is immaterial. It may be paid in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or it may be paid on an hourly, daily, weekly, monthly, annual or other basis. The remuneration may also be paid on the basis of an estimated or agreed upon amount in order to resolve an issue arising out of an employment or potential employment relationship. .

In this case, such remuneration constitutes wages as contemplated by the applicable statutes and administrative rule. Accordingly,

THE APPEALS BOARD AFFIRMS the Reconsidered Determination issued on October 27, 2005.

1. The Employer is liable for Arizona Unemployment insurance taxes beginning XXXXXXXX X, XXXX, under A.R.S. § 23-613.
2. Services performed by individuals as nurses constitute employment as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are employees within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.

3. The remuneration paid to individuals for the services performed, constitutes wages within the meaning of A.R.S. § 23-622, which must be reported and on which state taxes for unemployment insurance are required to be paid.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.
2. Parties may be represented in the following manner:

An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.

A copy of the foregoing was mailed on
to:

(x) Er: X/X XXXXXXX X. XXXXX, XXX Acct. No: XXXXXXX-XXX

(x) ROBERT DUNN
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(x) JOHN B. NORRIS, CHIEF OF TAX
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By: _____
For The Appeals Board